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# Inverse Condemnation - A Viable Alternative

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# INVERSE CONDEMNATION—A VIABLE ALTERNATIVE

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## INTRODUCTION

Citizens are experiencing a steady increase in governmental activities which often encroach on various individual property rights. The areas range from highway and airport projects to social and environmental problems. Some programs which benefit the general public often impose an undue burden on a single person or entity. The law of eminent domain was fashioned out of this conflict between the interest of the public vis-a-vis the principle of indemnity for the resultant damage. Over the years Colorado has developed a sound legal basis in eminent domain through statutes and case law.[1]

But situations have arisen in which private property or concommitants of its ownership were taken or damaged for public use without formal condemnation proceedings and without compensation. A remedy was needed to alleviate these situations whereby a landowner could institute an action to recover for loss when the entity possessing condemnation power failed to institute condemnation proceedings for compensation. The remedy which emerged was inverse condemnation. The cause of action is "inverse" because traditional constitutional eminent domain guarantees are invoked by the owner rather than a public agency.

Because of the proliferation of government projects, the practitioner should be aware of possible damages which a client may suffer through various activities. There should be an awareness that inverse condemnation is an available remedy; elements of the action must be known; and the procedures to follow in pursuing this remedy should be understood. This article will establish the groundwork for an inverse condemnation case in Colorado and suggest possible new areas for future use.

Rights of citizens in matters relating to eminent domain are based upon constitutional guarantees, statutory interpretations, and common law developments. The United States Constitution provides:

> No person shall be . . . deprived of life, liberty or property

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[1] Board of Comm'rs v. Adler, 69 Colo. 290, 194 P. 621 (1920); Denver Circle R.R. v. Nestor, 10 Colo. 403, 15 P. 714 (1887).

> without due process of law; nor shall private property be taken for public use without just compensation.[2]

In keeping with basic standards of the Federal Constitution, the Colorado founding document provides likewise, but enlarges the coverage:

> Private property shall not be taken or *damaged*, for public *or private* use, without just compensation . . . .
>
> No person shall be deprived of life, liberty or property without due process of law.[3]

The emphasized portions of the Colorado constitution provide substantial bases for many inverse condemnation cases. Often the cases involve damaging rather than taking; consequently, the added language in the Colorado constitution provides distinct theoretical and philosophical advantages to the practitioner.

## I. ELEMENTS OF THE ACTION

A system of fundamental principles applicable to inverse condemnation proceedings can be derived from constitutional, statutory, and common law decisions. Inverse condemnation is a very limited action, and caution should be exercised in ascertaining that all elements are present. Inverse condemnation is taking (or damaging under the Colorado constitution)[4] private property without formal proceedings for public (or private) use and without just compensation being paid by a government agency or private entity with the right of condemnation.

*Taking*: Foremost among the elements is that there must be a taking or, as in Colorado and some other jurisdictions, a damaging of private property for public purposes.[5] In Colorado, constitutional guarantees also apply to taking of private property for private purposes, *e.g.*, where land has been condemned to afford access to landlocked real property.[6] This threshold element is often the most difficult to pinpoint. The legislature has left to the judiciary determinations of when governmental action becomes so restrictive as to constitute a taking. Court decisions are sometimes vague, conflicting, and without pattern.[7]

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[2] U.S. CONST. amend. V.

[3] COLO. CONST. art. 2, § 15 (emphasis added).

[4] *Id.*

[5] Approximately one-half of the states require just compensation for "damaging" as well as "taking." 2A P. NICHOLS, EMINENT DOMAIN, § 6.44 (rev. 3d ed. 1970) [hereinafter cited as NICHOLS].

[6] COLO. CONST. art. 2, § 15.

[7] *See* Van Alstyne, *Taking or Damaging by Police Power: The Search For Inverse Condemnation Criteria*, 44 SO. CAL. L. REV. 1 (1970).

Federal limitations on "taking" actions are considerably more restrictive than Colorado's and require rather severe interference with property before compensation will be allowed.[8] A good example of the narrow federal limits are the overflight cases which use the pro forma rule that the offending plane must fly directly overhead.[9] An adjacent homeowner who is afflicted with smoke or noise, but does not suffer penetration of usable airspace above the real property is denied compensation because there is no taking found. Federal courts have long distinguished between taking and consequential damages, the latter not being recoverable.[10]

In other areas, the physical invasion test has not been as important. The classic example of rejection of this rigid standard was *Pennsylvania Coal Co. v. Mahon.*[11] Speaking for the Court, Justice Holmes reasoned: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[12] Every temporary trespass or damaging is not ipso facto a constitutional taking. Recently there has been a growing recognition at the federal level of the need to expand the scope of compensation to those affected by government activity. This attitude is evidenced by enactments such as the Highway Relocation Assistance Act[13] and the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970.[14]

While mere damage will probably not support a federal recovery, it will base state action in Colorado.[15] Colorado's constitution provides protection for property interests which substantially exceed that available under the fifth amendment. It not only recognizes an invasion which may be so severe as to amount to a taking, but also damages alone may be compensable. Recovery for damage, however, is not unrestricted; it must be different in both kind and degree from that suffered by the general public.[16]

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[8] Batten v. United States, 306 F.2d 580 (10th Cir. 1962).

[9] *Id.*; United States v. Causby, 328 U.S. 256 (1946).

[10] Nunnaly v. United States, 239 F. 2d 521 (4th Cir. 1956). Some states have relaxed this standard in state cases to allow recovery. *See also* Thornburg v. Port of Portland, 233 Or. 178, 376 P.2d 100 (1962) wherein the standard applied was whether the interference is sufficiently disturbing to the use and enjoyment as to constitute a taking.

[11] 260 U.S. 393 (1922).

[12] *Id.* at 415.

[13] 23 U.S.C. §§ 501-12 (1970), *repealed* Act of Jan. 2, 1971, Pub. L. No. 91-646, § 220(a), 84 Stat. 1903.

[14] 42 U.S.C. §§ 4601-4655 (1970).

[15] COLO. CONST. art. 2, § 15.

[16] Radinsky v. City & County of Denver, 159 Colo. 134, 410 P.2d 644 (1966); Gayton v. Department of Highways, 149 Colo. 72, 367 P.2d 899 (1962); City of Colorado Springs

*Private Property*: The common law theory of land ownership—*cajus est solum ejus est usque ad coelum* (implied rights to the heavens above)—no longer exists. While air travel has limited ownership rights in some ways,[17] there has also been a corollary expansion in the definition of ownership in other ways. If property for fifth amendment purposes means only possessory interest in real property, the concept of inverse condemnation would present little difficulty. This highly restrictive construction of property, however, was rejected by the Supreme Court in *United States v. Welch*.[18] The Court reasoned that an easement, like the right of possession, was just one element in the entire bundle of property rights held by the farmer in his land. Property interference may include not only property itself, but the right to acquire, use, and dispose of it.[19] Included are such things as water rights[20] and easements.[21] This expanded constitutional concept of property to include intangible rights makes it more difficult to determine whether or not the government has "taken" anything. As property rights evolve to include all those things incidental to ownership, anything which damages one of these rights to that extent destroys or diminishes the value of the property itself. It is axiomatic that all references to "property" include both real and personal property interests.

*Without Formal Proceedings or Just Compensation*: Two elements of inverse condemnation which differ from regular condemnation are: (a) the property was taken without formal proceedings, and (b) the property was taken without just compensation being paid. These elements turn the tables and cause the property owner to become the plaintiff. There are no significant definitional problems attached to the other elements of inverse condemnation; all that is required is absence of a proceeding and lack of compensation.

*Public Use*: The taking must be for a "public use" which is a very broad and flexible term. Colorado courts have held that property is taken for public use when it is taken to subserve a

v. Weiher, 110 Colo. 55, 129 P.2d 988 (1942); Gilbert v. Greeley, S.L. & P. Ry., 13 Colo. 501, 22 P. 814 (1889).

[17] United States v. Causby, 328 U.S. 256 (1946).

[18] 217 U.S. 333 (1910).

[19] City of Englewood v. Apostolic Christian Church, 146 Colo. 374, 362 P.2d 172 (1961).

[20] Farmers Irr. Co. v. Game & Fish Comm'n, 149 Colo. 318, 369 P.2d 557 (1962); United States v. Martin, 267 F.2d 764 (10th Cir. 1959).

[21] City & County of Denver v. Bayer, 7 Colo. 113, 2 P. 6 (1883).

public purpose.[22] Other cases hold that it must serve a public benefit or be of a public nature or advantage.[23] None of these definitions establish a clear standard. The "use by public" test in Colorado is not an infallible definition because the takings for various private enterprises such as for restaurants and hotels would presumptively be covered. Mere numbers of people who use the property taken is not determinative of whether it constitutes a public use.[24] A few examples of what Colorado courts have found to be public use are highways,[25] irrigation districts and canals,[26] urban renewal,[27] schools,[28] and parks.[29] Accrual of broad public benefits seems to be the common thread.

Primarily, the right to declare what shall be deemed a public use is vested in the legislature. The presumption is that a use is public if the legislature has declared it to be such.[30] Courts do not inquire into the necessity of the taking or whether it is a "public use" unless "bad faith" by the condemning body is found,[31] or unless the action was fraudulent or unreasonable.[32]

*Authority to Condemn*: There can be no inverse condemnation in a situation where no right existed in a governmental agency to proceed under eminent domain.[33] Because condemnation is in derogation of common law, statutes relating to it must be strictly construed,[34] and the grant of authority must be clearly expressed.[35] In the absence of these elements, another theory of recovery must be pursued.

## II. Practice and Procedure

The general procedure to be followed before undertaking an

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[22] McMahon v. City of Telluride, 79 Colo. 281, 244 P. 1017 (1926).

[23] Milheim v. Moffat Tunnel Improvement Dist., 72 Colo. 268, 211 P. 649 (1922); Tanner v. Treasury Tunnel, Mining & Reduction Co., 35 Colo. 593, 83 P. 464 (1906).

[24] Tanner v. Treasury Tunnel, Mining & Reduction Co., 35 Colo. 593, 83 P. 464 (1906).

[25] Town of Greenwood Village v. District Court, 138 Colo. 283, 332 P.2d 210 (1958).

[26] Dillinger v. North Sterling Irr. Dist., 135 Colo. 95, 308 P.2d 606 (1957); Farmers Indep. Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 P. 444 (1896).

[27] Pillar of Fire v. Denver Urban Renewal Authority, 509 P.2d 1250 (Colo. 1973).

[28] Schaefer v. School Dist., 111 Colo. 340, 141 P.2d 903 (1943).

[29] Londoner v. City & County of Denver, 52 Colo. 15, 119 P. 156 (1911).

[30] Tanner v. Treasury Tunnel, Mining & Reduction Co., 35 Colo. 593, 83 P. 464 (1906).

[31] Colorado State Bd. of Land Comm'rs v. District Court, 163 Colo. 338, 430 P.2d 617 (1967); Mack v. Board of County Comm'rs, 152 Colo. 300, 381 P.2d 987 (1963); Welch v. City & County of Denver, 141 Colo. 587, 349 P.2d 352 (1960).

[32] City & County of Denver v. Board of Comm'rs, 113 Colo. 150, 156 P.2d 101 (1945).

[33] Game & Fish Comm'n v. Farmers Irr. Co., 162 Colo. 301, 426 P.2d 562 (1967).

[34] Healy v. City of Delta, 59 Colo. 124, 147 P. 662 (1915); Colorado Fuel & Iron Co. v. Four Mile Ry., 29 Colo. 90, 66 P. 902 (1901).

[35] Potashnik v. Public Serv. Co., 126 Colo. 98, 247 P.2d 137 (1952).

inverse condemnation case includes carefully examining the premises in question. There should be a visual observation as well as a title search; all available information must be gathered. It would behoove counsel to become familiar with the surrounding area and to note the character of the property and neighborhood to determine whether the injury is peculiar to the client and to assess a damage framework. To reiterate, the injury is not compensable if it is suffered by the general public. When examining the property, first ascertain if any physical invasion fulfills the "taking or damaged" test. There are many intrusions which uphold the "taking or damaged" requirement, but none as persuasive or convincing to a jury as those which are visible. Consideration must also be given to whether the invasion is an aggravation of a preexisting condition or the creation of a new one. Old problems may not be actionable because of laches, release, or statutes of limitation.

It is important to consider three causes of action available in inverse condemnation cases. First, claims for damage resulting from diminution in market value of claimant's property as a result of the public project might be considered "pure" inverse condemnation. If the federal government or a federal agency is the defendant, the Tucker Act[36] is applicable under which claims must be based upon the Constitution, an act of Congress, a regulation of an executive department, any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. If the claim arises due to nonfederal invasion, the pure common law action is most frequently used. Unfortunately, monetary remuneration is the only feasible remedy.

Second, because of growing dissatisfaction with the rigid "direct and peculiar and substantial a burden" test[37] which is required in inverse condemnation cases, nuisance is sometimes seen as an alternative remedy.[38] The essence of private nuisance is an interference with use and enjoyment of land.[39] Interference must be substantial and unreasonable. Many areas and situations can be covered by nuisance because the breadth of definition of interference can include an infinite variety of invasions.

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[36] 28 U.S.C. § 1491 (1970).

[37] Richards v. Washington Terminal Co., 233 U.S. 546, 557 (1914).

[38] Nestle v. City of Santa Monica, 6 Cal. 3d 920, 496 P.2d 480, 101 Cal. Rptr. 568 (1972).

[39] W. PROSSER, THE LAW OF TORTS § 89 (4th ed. 1971).

Third, trespass is another alternative. The relationship between trespass and inverse condemnation was recently delineated by the Colorado Supreme Court in *Ossman v. Mountain States Telephone and Telegraph Co.*[40] That case held "that a landowner has a right to sue in trespass even though the trespasser may have the statutory power of eminent domain with respect to the land on which the trespass occurs."[41] The landowner has the right to elect to sue in trespass where the trespasser refuses to promptly initiate eminent domain proceedings. Trespass offers an advantage over inverse condemnation because exemplary damages as well as special damages may be awarded in a proper case.

Three areas of equitable relief are also available. First, injunction is sometimes sought to prevent the project from being constructed or the operation from continuing. As with the other types of equitable relief, courts are hesitant to entertain this remedy unless there is an absolute absence of legal remedies.[42] This inquiry is the proper method to question unlawful or improper exercise of eminent domain power, but the court still does not have power to inquire into the necessity of exercising the power.[43]

Second, mandamus action inquires into the governmental authority to undertake a project. It must clearly appear that the landowner is legally entitled to the relief, benefit or protection sought to be enforced, and that the agency is under a legal duty to perform or abstain from the acts in question.

Third, prohibition lies in these settings to prevent a court from exceeding its jurisdiction. It is frequently used in conjunction with mandamus or injunction.[44]

Some cases may warrant combining several mentioned remedies. Courts often use and blend nuisance and trespass terminology in deciding inverse condemnation cases. The resulting amalgamation tends to obscure the decisional basis. A recent nuance in the field of inverse condemnation has presented itself under the expanding view in federal courts of the Civil Rights Act.[45] Cast in this setting, numerous fact situations are suggestive of conduct under color of state law of such a nature as to be either a threatened deprivation of constitutionally guaranteed rights or a flat abusive or coercive exercise of the power of eminent domain.

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[40] 520 P.2d 738 (Colo. 1974).

[41] *Id.* at 740.

[42] Colorado Cent. Power Co. v. City of Englewood, 89 F.2d 233 (10th Cir. 1937).

[43] Dunham v. City of Golden, 31 Colo. App. 433, 504 P.2d 360 (1972).

[44] Colorado *ex rel.* Watrous v. District Court of United States, 207 F.2d 50 (10th Cir. 1953).

[45] 42 U.S.C. § 1983 (1970).

Except for pleadings of the property owner, usual and customary procedures of direct condemnation actions are followed in inverse matters.[46] Two eminent domain concepts in direct condemnation are highly analogous to the legal procedures to be followed in an inverse condemnation case. They are: (a) a partial taking with residual damage,[47] and (b) the taking or destruction of access without a physical intrusion.[48] Methods of putting on evidence and submission of issues in trial in an inverse case are, for all intents and purposes, very similar to direct condemnation. Since 1951, federal procedure in condemnation cases has been governed by Rule 71(a) of Federal Rules of Civil Procedure; state procedure is governed by Chapter 50 of the Colorado Revised Statutes.

In Colorado, inverse condemnation proceedings are tried as if they were eminent domain proceedings.[49] Consequently, inverse condemnation proceedings are statutory in nature and must be conducted strictly according to procedures set out in the eminent domain statute.[50] The district courts have jurisdiction over any case concerning property situated within their boundaries.[51] Rule 98 of the Colorado Rules of Civil Procedure places venue in the county in which the subject of the action, or a substantial part of it, is located. There are several advantages in bringing the action in state courts. Colorado generally recognizes a condemnee's right to recover reasonable expert witness fees.[52] Attorneys' fees had not previously been included as compensable expenses, but statutory enactment now makes it possible for a property owner to recover these fees if successful in the proceeding.[53] There

[46] Union Exploration Co. v. Moffatt Tunnel Improvement Dist., 104 Colo. 109, 89 P.2d 257 (1939); San Luis Valley Irr. Dist. v. Noffsinger, 85 Colo. 202, 274 P. 827 (1929).

[47] United States v. Grizzard, 219 U.S. 180 (1911).

[48] City of Chicago v. Taylor, 125 U.S. 161 (1888).

[49] Ossman v. Mountain States Tel. & Tel. Co., 520 P.2d 738, 742 (Colo. 1974).

[50] *Id.* The Colorado eminent domain statute is contained in COLO. REV. STAT. ANN. §§ 50-1-1 to -6-22 (1963).

[51] *Id.* § 50-6-2 (1963); *id.* § 50-1-2 (Supp. 1965).

[52] Leadville Water Co. v. Parkville Water Dist., 164 Colo. 362, 436 P.2d 659 (1967); Denver Joint Stock Land Bank v. Board of County Comm'rs, 105 Colo. 366, 98 P.2d 283 (1940); COLO. REV. STAT. ANN. § 56-6-2(4) (Supp. 1971).

[53] COLO. REV. STAT. ANN. § 69-10-16 (Supp. 1971).

> *Inverse condemnation proceedings.* Where an inverse condemnation proceeding is instituted by the owner of any right, title, or interest in real property because of the alleged taking of his property for any program or project for which federal financial assistance will be available to pay all or any part of the cost of the program or project, the court, rendering a judgment for the plaintiff in such proceeding and awarding compensation for the

has been neither statutory nor common law right in federal courts for the allowance of expert fees in any type of case, including condemnation;[54] however, a recent trend in federal legislation and court decisions in this area is toward recognizing the right to recover expert witness fees and in some cases attorneys' fees.[55]

Actions may be removed from state to federal courts if the district court would have had original jurisdiction or if there is a federal question.[56] It must be noted, however, that the state and state agencies are not "citizens." Consequently, where condemnation is by the state or one of its agencies, removal is improper.[57]

The Tucker Act[58] is Congress' only grant of jurisdiction over claims against the United States for a violation of the fifth amendment's prohibition against governmental taking of private property without just compensation.[59] The Tucker Act grants plenary jurisdiction to the Court of Claims,[60] while district court jurisdiction is limited to claims not exceeding $10,000.[61] The

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> taking of property, or attorney for the acquiring agency effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will, in the opinion of the court or such attorney, reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

*Id.*

[54] Henkel v. Chicago, St. P., M. & O. Ry., 58 F.2d 159 (8th Cir. 1932); Taylor v. Washington Terminal Co., 308 F. Supp. 1152 (D.D.C. 1970); Morgan v. Knight, 294 F. Supp. 40 (E.D.N.C. 1968).

[55] United States v. 12.85 Acres of Land, 321 F. Supp. 651 (S.D. Tenn. 1971). This case held that 28 U.S.C. § 2412 (1970) which provides certain costs "may be awarded to the prevailing party in any civil action brought by or against the United States" applies to condemnation. 42 U.S.C. § 4654 (1970) now provides for payment of attorneys' fees as well as appraisers' fees if the United States abandons a condemnation action or if the court declares no federal right to take the property.

[56] 28 U.S.C. § 1441 (1970).

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States . . . .
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> (b) [Federal question cases may be removed without regard to citizenship but] any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

[57] State Highway Comm'n v. Utah Constr. Co., 278 U.S. 194 (1929); Colorado *ex rel.* Land Acquisition Comm'n v. American Mach. & Foundry Co., 143 F. Supp. 703 (D. Colo. 1956).

[58] Federal Tort Claims Act 28 U.S.C. § 1346 (1970).

[59] Vigil v. United States, 293 F. Supp. 1176 (D. Colo. 1970).

[60] 28 U.S.C. § 1491 (1970).

[61] Myers v. United States, 323 F.2d 580 (9th Cir. 1963).

United States or one of its agencies is defendant in these actions.[62] The claim must be based upon the Constitution, an act of Congress, a regulation of an executive department, any express or implied contract with the United States,[63] or for liquidated or unliquidated damages in cases not sounding in tort.[64] The district court may, at its discretion, transfer a case to the Court of Claims under the Tucker Act when the claim turns out to be more than $10,000 and "if it be in the interest of justice."[65] Venue in federal cases is in the district court of the district where the land is located or, if located in different districts within the same state, in any of such districts.[66]

At an early stage in the proceedings, it may be well to test the efficacy of the complaint by an *in limine* motion to determine whether damages claimed are compensable as a matter of law.[67] In Colorado the court is not authorized to determine questions as to the necessity of the exercise of power of eminent domain.[68] It may, however, inquire into whether: (1) the governmental body is entitled to condemn; (2) the property sought to be taken belongs to a class of property subject to condemnation; (3) the purpose for which property is sought to be taken is one for which condemnation is permitted, *i.e.*, a public use; (4) the condemning body and owner have been able to come to an agreement concerning the purchase of the land—that is, if there were proper negotiations; or (5) the act authorizing the proceeding is constitutional.

*Parties*: Parties in an inverse condemnation action stand in opposite relationship to those in direct proceedings. Plaintiffs in inverse cases are usually owners, occupiers, or possessors of property taken or damaged. Other parties in interest who may present themselves in varying fact situations include tenants for years,[69] life tenants, remaindermen or reversioners,[70] mortgagees, per-

[62] *See* United States v. Wald, 330 F.2d 871 (10th Cir. 1964). When the United States takes property for public use and without compensation, owner may sue under 28 U.S.C. § 1346 (1970).

[63] This theory of implied contract is used often in inverse condemnation cases in that the government, by appropriating the property right, implies that it will pay for it.

[64] 28 U.S.C. § 1346(a)(2) (1970).

[65] 28 U.S.C. § 1406(c) (1970). *See* United States v. Northern Colo. Water Conservancy Dist., 449 F.2d 1 (10th Cir. 1971).

[66] 28 U.S.C. § 1403 (1970).

[67] Troiano v. Colorado Dep't of Highways, 170 Colo. 484, 463 P.2d 448 (1970); Radinsky v. City & County of Denver, 159 Colo. 134, 410 P.2d 644 (1966); COLO. REV. STAT. ANN. § 50-1-1 (1963); Davis, *Motions in Limine*, 15 CLEV.- MAR. L. REV. 255 (1966).

[68] Pine Martin Mining Co. v. Empire Zinc Co., 90 Colo. 529, 11 P.2d 221 (1932).

[69] A.W. Duckett & Co., v. United States, 266 U.S. 149 (1924).

[70] 27 AM. JUR. 2d *Eminent Domain* § 251 (1966).

sonal representatives, heirs, or owners of mineral and water rights.[71]

Enlarging the scope of condemnation powers has caused an increase in the number of entities authorized to condemn. Likewise, there has been an expansive growth in the power of condemning authorities. Defendants on the federal level customarily are governmental agencies conducting the project which possess condemnation powers by virtue of statutory authority founding the service or agency. Agencies such as the Forest Service, Corps of Engineers, Bureau of Reclamation, Department of Defense, or the Department of Interior are included.

On the state level, the state itself is a prime condemner with its various departments such as the Highway Department and the Department of Fish and Game. Counties, cities, towns, and school districts are granted the power of condemnation through state legislation. Determination as to whether the political subdivision being sued does in fact have the power of condemnation and whether it is acting within the scope of the grant should be made. Expansion of condemnation powers and the need for more public facilities have made the quasi-municipal corporation a usual defendant in the inverse condemnation setting. Railroad companies, utility companies, water and sanitation districts, and urban renewal authorities are included. As with the political subdivisions, these quasi-municipal corporations' grant of power and their scope of power must be carefully scrutinized.

*Pleadings*: Once the fact situation is enunciated and parties identified, actual pleading should include certain basics concluding with a prayer for damages which are required under the Constitution to compensate for property taken.[72] The following items must be alleged as essential elements precedent to recovery:[73] (1) identity and capacity of parties defendant spelled out in detail, particularly as they relate to the exercise of governmental powers by defendant;[74] (2) ownership of the fee or a lesser interest in the land taken;[75] (3) conduct constituting a basis for the cause stated

[71] Twin Lakes Hydraulic Gold Mining Syndicate (Ltd.) v. Colorado M. Ry., 16 Colo. 1, 27 P. 258 (1890).

[72] U.S. CONST. amend. V.

[73] *See* 8 AM. JUR. TRIALS *Pleading* § 31 (1965).

[74] *See* Wilfong v. United States, 480 F.2d 1326 (Ct. Cl. 1973),wherein the court held that to support a fifth amendment taking via inverse condemnation, there must not only be shown federal activity or project, but it must be permanent in nature. Game & Fish Comm'n v. Farmers Irr. Co., 162 Colo. 306, 426 P.2d 562 (1967).

[75] Monen v. State Dep't of Highways, 515 P.2d 1246 (Colo. Ct. App. 1973). The right to damages accrues to the owner of the land at the time of the taking and is personal to him unless specifically assigned to subsequent grantees.

with specificity and the exact nature of interference with private property by condemning authority;[76] (4) the legal duty of defendant to pay just compensation for land or interest taken or damaged; (5) the neglect or refusal of defendant to pay for land taken or the damage created; (6) existence of damages to claimant different in both kind and degree from that suffered by the general public;[77] (7) an extensive, step-by-step spelling out of such facts and circumstances as might entitle claimant to relief; (8) itemization of any conduct of the governmental body which might show bad faith, fraud, or malicious motive;[78] (9) specific physical damage, injury, or impairment of appurtenances; (10) value of the land taken or damaged measured by the dollar amount of damages constituting diminution in market value (or the value before as compared with the value after the project) of the claimant's property; and (11) finally, if the taking involves only a part of the claimant's land, severance damages, *i.e.*, reduction in value of claimant's remaining land as a result of the taking.

## III. DEFENSES

Usual and customary defenses are available to the governmental authority in inverse eminent domain proceedings and should be examined by plaintiff very carefully. Before commencing an action, all possible stumbling blocks should be examined. Despite the broad language of the Colorado statutes, the courts have upheld various exceptions to the rule of just compensation. Because defendant did not compensate plaintiff in the first place, all possible defenses will be called into play. Those defenses include:

(1) The project constitutes a valid exercise of police power.[79] The line between police power and eminent domain is often indiscernible and might turn on policy. To be within the police power, the act must be done on behalf of public health, morals, or safety. The action must be reasonable and adapted to the scope of the problem with power usually limited to regulation, impairment, or destruction. This defense has definite limitations, but it is usually most successful when used in connection with emergency situations.

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[76] Farmers Irr. Co. v. Game & Fish Comm'n, 149 Colo. 318, 369 P.2d 557 (1962).

[77] Radinsky v. City & County of Denver, 159 Colo. 134, 410 P.2d 644 (1966); Gayton v. Department of Highways, 149 Colo. 72, 367 P.2d 899 (1962).

[78] Arizona-Colorado Land & Cattle Co. v. District Court, 511 P.2d 23 (Colo. 1973); Union Pac. R.R. v. Colorado Postal Tel.-Cable Co., 30 Colo. 133, 69 P. 564 (1902).

[79] State v. Lavasek, 73 N.M. 33, 385 P.2d 361 (1963); Morlane Co. v. Highway Dep't, 384 S.W.2d 415 (Tex. 1964); Annot., 14 A.L.R.2d 73 (1950); 26 AM. JUR. 2d *Eminent Domain* § 41 at 693 (1966); 16 AM. JUR. 2d *Constitutional Law* § 301 (1964).

(2) Temporary takings are not actionable.[80] This defense is closely related to the police power, and its justification is often couched in police power terminology. In the federal area, to support a fifth amendment taking via inverse condemnation there must be a project which is permanent in nature.[81]

(3) The 6-year statute of limitations[82] or its equitable counterpart, laches, is available.[83] This defense can be particularly important in Colorado if the action is based on damage without taking. The limitation might apply and bar suit for damages incurred prior to the time limitation of the statute.[84] If the taking was a gradual encroachment, the time of the actual taking becomes difficult to determine and is crucial.

(4) Incidental losses, de minimus damages,[85] and damages to business[86] are similar defenses. Proof of these defenses is often nebulous. Recovery is sometimes denied because of judicial fear that allowing payment would make condemnation too expensive, retard social progress, and open the courts to a multitude of cases. Loss-of-business damages are traditionally considered highly speculative.

(5) The defenses of mere inconvenience[87] and circuity of route[88] have a similar basis. The loss to the property owner must be different in kind and degree. The hardship felt in cases such as blocking a street entrance is really a public burden and not different in kind to the plaintiff; he might suffer more only in degree.

(6) Statutory prohibitions may bar the action. An example is the Colorado statute dealing with limited access highways.[89] It would probably bar the assertion of an inverse condemnation

[80] State Highway v. Peters, 416 P.2d 390 (Wyo. 1968); Commonwealth v. Sherrod, 367 S.W.2d 844 (Ky. 1963); Lybargar v. State Dep't of Roads, 128 N.W.2d 132 (Neb. 1964).

[81] Wilfong v. United States, 480 F.2d 1326 (Ct. Cl. 1973).

[82] COLO. REV. STAT. ANN. § 87-1-11 (1963).

[83] Seven Lakes Reservoir Co. v. Majors, 69 Colo. 590, 196 P. 334 (1921).

[84] Zimmerman v. Hinderlider, 85 Colo. 176, 97 P.2d 443 (1939); Fort v. Bietsch, 105 Colo. 340, 274 P. 812 (1929); Seven Lakes Reservoir Co. v. Majors, 69 Colo. 590, 196 P.334 (1921). *See also*, Cheskov v. Port of Seattle, 55 Wash. 2d 416, 348 P.2d 673 (1960).

[85] Gayton v. Department of Highways 149 Colo. 72, 377 P.2d 899 (1962).

[86] City & County of Denver v. Tondall, 86 Colo. 372, 282 P. 191 (1929).

[87] Radinsky v. City & County of Denver, 159 Colo. 134, 410 P.2d 644 (1966).

[88] *Id.*; Gayton v. Department of Highways, 149 Colo. 72, 367 P.2d 899 (1962); State v. Danfelser, 72 N.M. 361, 384 P.2d 241 (1963); Northern Light Shopping Center v. State, 15 N.Y.2d 688, 204 N.E.2d 333, 247 N.Y.S.2d 333 (1964), *cert. denied*, 382 U.S. 826 (1965); County Comm'rs v. Slaughter, 49 N.M. 141, 158 P.2d 859 (1945). *But see* State v. Terry, 194 So. 2d 144 (La. 1966).

[89] COLO. REV. STAT. ANN. § 120-6-2(2) (1963).

action as to access taken if the claim was based on establishment of a limited access highway across plaintiff's property and if it came within the purview of statutory language.

(7) *Damnum absque injuria* is a vague concept which is really a summation of all the above-listed defenses.[90] It is damage without legal result, thus not compensable as a matter of law. An example of this defense is sometimes found where a property owner suffers damage and loss of property value because of condemnation proceedings which are legally abandoned.[91]

*Burden of Proof*: The burden of proof lies generally with the plaintiff-owner asserting damages to his property resulting from governmental action.[92] He must prove both the manner of damage or taking and the extent.[93] Proof by a preponderance of the evidence[94] must be had as to reasonable market value of the property taken and the damages, if any, to the residue.[95] Some courts have required the landowner to show a definite diminution of market value of his property if the action is inverse.[96]

As in direct eminent domain proceedings, the burden is on the condemning authority to establish benefits, if any, from the public project. Those benefits must be specific benefits to the property taken or damaged rather than general benefits accruing to the public at large.

*Damages*: Damages in inverse condemnation are the reduction in reasonable market value[97] of plaintiff's interest in the

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[90] *See* City & County of Denver v. Bayer, 7 Colo. 113, 2 P. 6 (1883); Kansas City v. Berkshire Lumber Co., 393 S.W.2d 470 (Mo. 1965); Baldwin-Hall Co. v. State, 22 App. Div. 2d 747, 253 N.Y.S.2d 651 (1964); Sheridan Drive-in Theater, Inc. v. State, 384 P. 2d 597 (Wyo. 1963); Happy, *Damnum Absque Injuria: When Private Property May be Damaged Without Compensation in Missouri*, 36 MO. L. REV. 453 (1971).

[91] Kean v. Union County Park Comm'n, 130 N.J. 591, 22 A.2d 256 (1941). *But see* Piz v. Housing Authority, 132 Colo. 457, 289 P.2d 905 (1955), which permitted damages awarded to a bakery owner for buying replacement property after the Denver Housing Authority lost a condemnation case and thereafter decided to abandon the taking of the property.

[92] Board of County Comm'rs v. Noble, 117 Colo. 77, 184 P.2d 142 (1947).

[93] *Id. Noble* sets forth the rules regarding the weight of the burden of proof and the allocation of the burden of proof between the parties on the various issues. *Id.* at 80-81, 184 P.2d at 143-44.

[94] COLO. REV. STAT. ANN. § 52-1-28 (Supp. 1971).

[95] Gayton v. Department of Highways, 149 Colo. 72, 367 P.2d 899 (1962).

[96] Alevzios v. Metropolitan Air Comm'n, 216 N.W.2d 651 (Minn. 1974).

[97] Although the statute refers to the "true and actual" value of the property, the Colorado Supreme Court has construed this language to mean "reasonable market value." *See* Vivian v. Board of Trustees, 152 Colo. 556, 383 P.2d 801 (1963); COLO. REV. STAT. ANN. § 50-1-17 (1963). The federal courts consider that the property owner is entitled only to just compensation. *See* Berman v. Parker, 348 U.S. 26 (1954).

property at the date of taking.[98] Reasonable or fair market value is the price for which the property could have been sold on the open market for cash under usual and ordinary circumstances, *i.e.*, under those circumstances where the owner was willing to sell and the purchaser was willing to buy, but neither was obligated to do so.[99] In determining damages, improvements on the property at the time of the taking, the use, conditions and surroundings of the property,[100] and sales of comparable property in the vicinity must all be considered.[101] The most advantageous use or uses to which the property might reasonably and lawfully be put in the future by persons of ordinary prudence and judgment shall be considered,[102] this element being referred to as highest and best use.

In establishing damages, the owner's opinion as to fair market value may be heard as well as appraisers and other claimed experts.[103] Damages are determined by what the property owner lost as a result of the taking and not what the government gained. Neither the property value to the public nor the purpose to which it will be applied may be considered. Nor may consideration be given as to whether plaintiff-owner wanted to sell.[104]

As a general rule, the method for determining just compensation for the owner in a partial taking is to compare fair market value of the property before and after taking.[105] This determination is accomplished by subtracting fair market value of what remains after the taking from fair market value of the whole before taking. Not all factors which render the residue less valuable are compensable. Such damages must flow from the severance itself, or, if they flow from the proposed public use, they must be unique and peculiar to the residue.[106] Evidence of comparable sales *after* the date of valuation as well as prior sales may be

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[98] Under the statute, the valuation date is the date "the petitioner is authorized by agreement, stipulation, or court order to take possession, or the date of trial or hearing to assess compensation, whichever is earlier." COLO. REV. STAT. ANN. § 50-1-17 (1963).

[99] Kistler v. Northern Colo. Water Conservancy Dist., 126 Colo. 11, 246 P.2d 616 (1952).

[100] Wassenich v. City & County of Denver, 67 Colo. 456, 186 P. 533 (1919).

[101] COLO. REV. STAT. ANN. § 50-1-21 (1963).

[102] Sill Corp. v. United States, 343 F.2d 411 (10th Cir.), *cert. denied*, 382 U.S. 840 (1965); Ruth v. Department of Highways, 145 Colo. 546, 359 P.2d 1033 (1961).

[103] 5 NICHOLS § 18.1[4]; Union Trust Co. v. Woodrow Mfg. Co., 63 F.2d 602 (8th Cir. 1933).

[104] United States v. Miller, 317 U.S. 369 (1943); 4 NICHOLS § 12.21.

[105] United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961).

[106] *See generally* Gayton v. Department of Highways, 149 Colo. 72, 367 P.2d 899 (1962); A. JAHR, EMINENT DOMAIN 133-46 (1953).

considered,[107] but such sales must not be excessively remote in time.

## IV. POSSIBLE FACT SITUATIONS

A wide latitude of situations exist where inverse condemnation can be used. A number of new areas where it may become a useful theory to consider will also be explored. The cases are divided into four categories merely as an attempt to create some order out of the plethora. These categories are purely arbitrary and far from exclusive.

### A. *Physical Invasions*

The inverse condemnation cases which are most often encountered are physical invasions of property, such as power line overhang and the razing of buildings by government entities without condemnation proceedings. A logical beginning in this area is to consider the earth, or the loss of it. Cases based on loss of lateral support include such instances as buildings settling and cracking because the adjacent land has been withdrawn by excavation.[108] In apposition is the problem created when earth is deposited on property.[109] This backfill not only damages land, but it may amount to a taking if the owner is unable to make effective use of that portion of the land. A public entity has been held liable for the silting of a private lake from erosion of an unstabilized highway embankment.[110]

Water is often encountered in physical invasion cases. Where there has been dam construction[111] or a change in the water course,[112] faulty storm sewers, or irrigation ditches which overflow improperly, land which is thereby inundated is obviously damaged or taken. A new development in water cases is evolving in pollution problems. A city's action in polluting streams was found to constitute a prima facie case of inverse condemnation,[113] as was pollution of a spring by seepage from a septic tank.[114]

Governmental agencies in carrying out their duties often fail to provide for the interest of individuals tangentially affected.

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[107] 5 NICHOLS § 21.31 [2].

[108] Holtz v. Superior Court, 3 Cal. 3d 296, 90 Cal. Rptr. 345, 475 P.2d 441 (1970).

[109] Central Realty Co. v. City of Chattanooga, 169 Tenn. 525, 89 S.W.2d 346 (1936).

[110] Commonwealth v. Cochrane, 397 S.E.2d 155 (Ky. Ct. App. 1965).

[111] United States v. Northern Colo. Water Conservancy Dist., 449 F.2d 1 (10th Cir. 1971).

[112] Shaeffer v. State, 3 Cal. App. 3d 348, 83 Cal. Rptr. 347 (1970).

[113] City of Walla Walla v. Conkey, 6 Wash. App. 6, 492 P.2d 589 (1971).

[114] Eller v. Board of Educ., 242 N.C. 584, 89 S.E.2d 144 (1955).

Through street construction, bridge and viaduct construction,[115] changes in the grade of the street,[116] denial of access,[117] and extraordinary or different use of existing way,[118] highway and street departments of the state and city are continually harming property owners. The importance of access to roads cannot be overemphasized. A property's value, whether commercial or residential, is often dependent on the type of access available. Changes in traffic flow or use of the street can drastically affect land values.

In recent years when emphasis has been on construction of a vast network of superhighways, many injuries to individuals' properties were ignored. With the change in government priorities, highways have become less important, and damaged individuals are being given more consideration. Inverse condemnation may be evoked not only during construction, but negligent design, maintenance, or repair of public improvements are now recognized as actionable.[119] Thus, such operations as salting a turnpike which damaged the abutting property have become actionable.[120]

### B. *Nonphysical Encroachments*

Physical encroachments on plaintiff's land are usually easier to recognize than the following which, for want of a better term, are called nonphysical. These burdens on land offend the physical senses of smell, sight, and hearing. Because aesthetic taste is involved, these areas have caused great problems in the inverse area. In many instances recovery has not been allowed unless there has also been some property taken. Damages are based on the harmful effect these nonphysical interferences have on value of remaining property making recovery conditioned on a quantum of physical taking or damaging.

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[115] City of Chicago v. Taylor, 125 U.S. 161 (1888); People v. Ricciardi, 23 Cal. 2d 532, 144 P.2d 799 (1943); Minnequa Lumber Co. v. City & County of Denver, 67 Colo. 472, 186 P. 539 (1919); Liddick v. City of Council Bluffs, 232 Iowa 197, 5 N.W.2d 361 (1942). *Contra*, Troiano v. Department of Highways, 170 Colo. 484, 463 P.2d 448 (1969); Radinsky v. City & County of Denver, 159 Colo. 134, 410 P.2d 644 (1966).

[116] City & County of Denver v. Bonesteel, 30 Colo. 107, 69 P. 595 (1902); Atchison Ice Co. v. City of Atchison, 172 Kan. 94, 238 P.2d 531 (1951); Hatch, *Survey of Recent Case Law re the Compensability of Access Impairment in Eminent Domain*, A.B.A. COMM. ON CONDEMNATION AND CONDEMNATION PROCEDURE, SEC. OF LOCAL AND GOV'T LAW 361 (1968).

[117] Denver Union Terminal Ry. v. Glodt, 67 Colo. 115, 186 P. 904 (1919).

[118] City of Pueblo v. Strait, 20 Colo. 13, 36 P. 789 (1894). *See also* Annot., 51 A.L.R.3d 860 (1973).

[119] State v. Lovett, 254 Ind. 27, 257 N.E.2d 298 (1970).

[120] Foss v. Maine Turnpike Authority, 309 A.2d 339 (Me. 1973).

It has generally been held that noise or vibration cannot in and of itself constitute a taking of property in the constitutional sense.[121] The position has been taken that compensation may be obtained for physical damage done by the noise and vibration even absent an actual condemnation.[122] Loss of enjoyment or simple inconvenience suffered by a property owner as a result of noise and vibration is not "damage" where conditions complained of are common to other property owners in the neighborhood.[123] The injury must be peculiar to the claimant.

The federal rule on aircraft noise is that the aircraft must actually invade the super-adjacent airspace of a landowner before there can be recovery.[124] There must be a physical interference in conjunction with the noise interference. Noise from an aircraft laterally near but not over the owner's land is not compensable.[125] The sonic boom case, *Laird v. Nelms*,[126] effectively foreclosed strict liability recovery in tort for damages caused by the sound because the problem was isolated and not permanent which did not constitute wrongdoing by the government.[127]

Like noise, vibration which is either bothersome or harmful can come from many different sources. The obvious case is a blasting operation or nearby pile driving which causes structural damage to a building.[128] A highway which has developed a "washboard" surface may damage nearby structures.[129] Cases involving vibration must, as a rule, show physical damage created by the vibration. Mere human discomfort does not suffice. Courts in this area continue to mirror society's attitudes that things are more worth judicial protection than people, but hopefully that position may be slowly eroding.

People can be very sensitive about odors wafting about their property. Sewage plants, garbage incinerators, and city dumps are common offenders.[130] There is no question that effluvia detri-

[121] People *ex rel.* Dep't of Public Works v. Symons, 54 Cal. 2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960).

[122] State v. Williams, 22 Utah 2d 331, 452 P.2d 881 (1969); City of Yakima v. Dahlin, 55 Wash. App. 129, 485 P.2d 628 (1971).

[123] Lombardy v. Peter Kiewit Sons' Co., 266 Cal. App. 2d 599, 72 Cal. Rptr. 240, *appeal dismissed*, 394 U.S. 813 (1968).

[124] United States v. Causby, 328 U.S. 256 (1946).

[125] Batten v. United States, 306 F.2d 580 (10th Cir. 1962).

[126] 406 U.S. 797 (1972).

[127] Kirk v. United States, 451 F.2d 690 (10th Cir. 1971).

[128] Raymond v. Department of Highways, 255 La. 425, 231 So. 2d 375 (1970).

[129] City of Pueblo v. Mace, 132 Colo. 89, 285 P.2d 596 (1955).

[130] Sewer Improvement Dist. No. 1 v. Fiscus, 128 Ark. 250, 193 S.W. 521 (1917);

mentally affects the value of land as does extraordinary smoke and soot.[131]

The view from a piece of property also affects its value. Cases have recognized diminution of value because of the proximity of a public building,[132] and deprivation of privacy. View and seclusion are recoverable damage elements,[133] as are loss of light and air.[134]

### C. *Taking by Withholding of Governmental Service or Benefits*

The case which opened this area was *Bydlon v. United States*.[135] This inverse condemnation action was brought by owners of resort property located in the roadless upper reaches of Superior National Forest. The only feasible access to plaintiff's resort was by aircraft, and a substantial vacation business had developed based on this mode of access. In order to preserve wilderness characteristics of the forest, the government banned low flights and landings over the territory. This prevented plaintiff from bringing in guests or supplies. Judgment for plaintiff was for a "taking of the plaintiff's means of access to their properties by air."[136]

Colorado is in the midst of a struggle to save its environment and to accomodate its continually growing population. One method of control used by Florida has been land use regulations.[137] These laws definitely restrict a property owner's freedom to use and develop land by denying such things as land development permits or sewer service. Colorado makes it a misdemeanor to subdivide property into parcels of 35 acres or less without first obtaining the county planning commission approval.[138] Subdivision approval is a very powerful political and tactical device. A municipality's refusal to supply sewer service to a developer's property may be the decisive factor in preventing the land from

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Clinard v. Kernersville, 215 N.C. 245, 3 S.E.2d 267 (1939); Ivester v. City of Winston-Salem, 215 N.C. 1, 1 S.E.2d 88 (1939); Jacobs v. City of Seattle, 93 Wash. 171, 160 P. 299 (1917).

[131] Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

[132] Eachus v. Los Angeles Consol. Elec. Ry., 103 Cal. 614, 37 P. 750 (1894); Rigney v. City of Chicago, 102 Ill. 64 (1882); City of McAlester v. King, 317 P.2d 265 (Okla. 1957).

[133] Dennison v. State, 22 N.Y.2d 409, 239 N.E.2d 708, 293 N.Y.S.2d 68 (1968).

[134] Crawford v. City of Des Moines, 255 Iowa 861, 124 N.W.2d 868 (1963).

[135] 175 F. Supp. 891 (Ct. Cl. 1959).

[136] *Id.* at 894.

[137] *See* Harris, *Environmental Regulations, Zoning, and Withheld Municipal Services: Taking of Property by Multi-Government Action*, 25 U. FLA. L. REV. 635 (1973).

[138] Ch. 81, §§ 3, 4, [1972] Colo. Sess. Laws 499, *amending* COLO. REV. STAT. ANN. §§ 106-2-9(4)(a), 106-2-33(3)(b) (1963).

having any reasonable value or use. Developers around Denver in recent months have been refused water tap rights which figuratively speaking, has left their land high and dry. Developing land is analogous in many ways to developing coal mines. In a case concerning the regulation of coal mines, Justice Holmes speaking for the court stated:

> What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating it or destroying it.[139]

While land use controls do serve a utilitarian purpose, they also impose economic loss and in many cases this loss could be serious enough to constitute a taking. Zoning until recently has been handled as a purely constitutional issue. The well-recognized principle of zoning law was that where zoning regulation foreclosed any reasonable use of property, the ordinance was confiscatory and unconstitutional as applied. In *City of Cherry Hills Village v. Trans-Robles Corp.*,[140] sewer and water facilities, streets, and utilities had been installed on the basis of county zoning of ½-acre sites. The city then modified the zoning ordinance to 2½-acre sites which would preclude the use of the installed sewer and water facilities, streets, and other utilities. The zoning ordinance was ruled unconstitutional as it applied to the particular property in suit.

The act of zoning is a legislative proceeding and a valid exercise of the police power when reasonably related to public health, safety, morals, or general welfare. Unless the zoning fits into one of these categories, it becomes a taking under the eminent domain provisions and as such is compensable.

It must be remembered that property is more than the mere thing which a person owns. It is elemental that property also includes the right to acquire, use, and dispose of the thing owned.[141] Any legislative action which takes away any of these essential attributes of property or imposes unreasonable restrictions thereon violates the due process clause.

Other possible examples are denial or withdrawal of access to public roads,[142] withholding of urban renewal projects and public services until land values have dropped in an area,[143] refusal

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[139] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 at 415 (1922).

[140] 509 P.2d 797 (Colo. 1973).

[141] Buchanan v. Warley, 245 U.S. 60 (1917).

[142] COLO. REV. STAT. ANN. § 120-6-10 (1963).

[143] Foster v. Herley, 330 F.2d 87 (6th Cir. 1964).

of governmental bodies to enforce statutes or regulate pollution and crime which in turn causes neighboring property to diminish in value, and zoning ordinances which require, among other things, compulsory, involuntary offstreet parking maintained by the owner at his own expense as a prerequisite for doing business.[144]

D. *New Frontiers*

With the expanding interest in compensation, a broad range of fact situations may develop in which inverse condemnation might serve as a useful theory for recovery. The limits of its application may be limited only by the lawyer's imagination.

While inverse condemnation is usually associated with real property, an as yet undeveloped concept may also include using it for personal property damage. Government takings may result in confiscations of contraband without a warrant.[145] Statutes dealing with the destruction of materials which are health or safety hazards rarely include methods of reimbursement for lost property.

Zoning and land use planning also appear to be areas where inverse condemnation could be especially useful in the future. It may be used in such cases as where land is devalued because of the threat of condemnation or where the government delays for a long period of time before bringing any proceedings.[146] Such cases may arise when the government starts condemnation proceedings, the owner buys replacement property, and then the whole condemnation is abandoned because of a change of the government's plans. Many municipalities now require donations of lands, schools, or roads by developers prior to plat acceptance, zoning, or annexation. These requirements appear to constitute a taking, and whether the city's plat approval is "just compensation" is questionable at best.

## CONCLUSION

Between the enlargement of governmental activities which

[144] City & County of Denver v. Denver Buick, Inc., 141 Colo. 121, 347 P.2d 919 (1959).

[145] Note, *Inverse Condemnation and Nuisance: Alternative Remedies for Airport Noise Damage*, 24 SYRACUSE L. REV. 793 (1973).

[146] *But see* Sayer v. City of Cleveland, 493 F.2d 64 (6th Cir. 1974). In this case the city of Cleveland denominated the broad boundaries of the general neighborhood renewal plan and within these boundaries did not "take or condemn" all of the properties; a property owner whose land was within the general neighborhood renewal plan did not have this property "taken" because the values in the general neighborhood renewal plan area disminished as a result of the designation.

result in more taking or damaging and the trend in judicial decisions which allow recovery in a wider latitude of cases, inverse condemnation actions are becoming more numerous. The practitioner, if presented with a possible case, should not hesitate to traverse this legal hinterland. Courts have been involved for a considerable period of time in developing a body of common law in this area. This variety of case decisions which construe and interpret constitutional guarantees and statutory amplifications, makes inverse condemnation a viable tool in dealing with governmental taking or damaging of private property. Increasing governmental activities should make more manifest the opportunities for inverse condemnation.

Justice Pringle in his *Troiano*[147] dissent succinctly stated the policy underlying recovery in inverse condemnation and charted a course for future decisions:

> In this day, when the trend is to apply humane and enlightened expression to the law so as to provide, for instance, that loss to an individual without his fault by reason of the use of a product should be spread among those who received the benefit of the product, I would think it only proper to hold that the public as the recipient of the benefits of the public involvement ought to bear the irretrievable loss suffered by the individual whose use of his property is not noxious nor injurious to the public and whose only sin is that his property is located adjacent to the improvement.[148]

This view would seem to presage the future direction of inverse condemnation. On the federal level such legislation as the Uniform Relocation Assistance and Real Property Acquisitions Policies Act[149] has provided not only payment for the property acquired, but has also granted moving expenses incident to the condemnation. On the state level, Colorado now provides for attorneys' fees in successful cases.[150] The legislative and judicial position is toward complete compensation for injured parties, and Colorado is presently at this threshold.

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[147] Troiano v. Department of Highways, 170 Colo. 484, 503, 463 P.2d 448, 457 (1970).

[148] *Id.* at 503, 463 P.2d at 457.

[149] 84 Stat. 1894, 42 U.S.C. §§ 1415, 2473, 3307, 4601-02, 4621-38, 4651-55, 49 U.S.C. § 1606 (1971).

[150] *See* note 53 *supra*.